No. 95.

Brief of Greene for P. E.

95

Filed OCT. 12, 1898.

Supreme Court of the United States

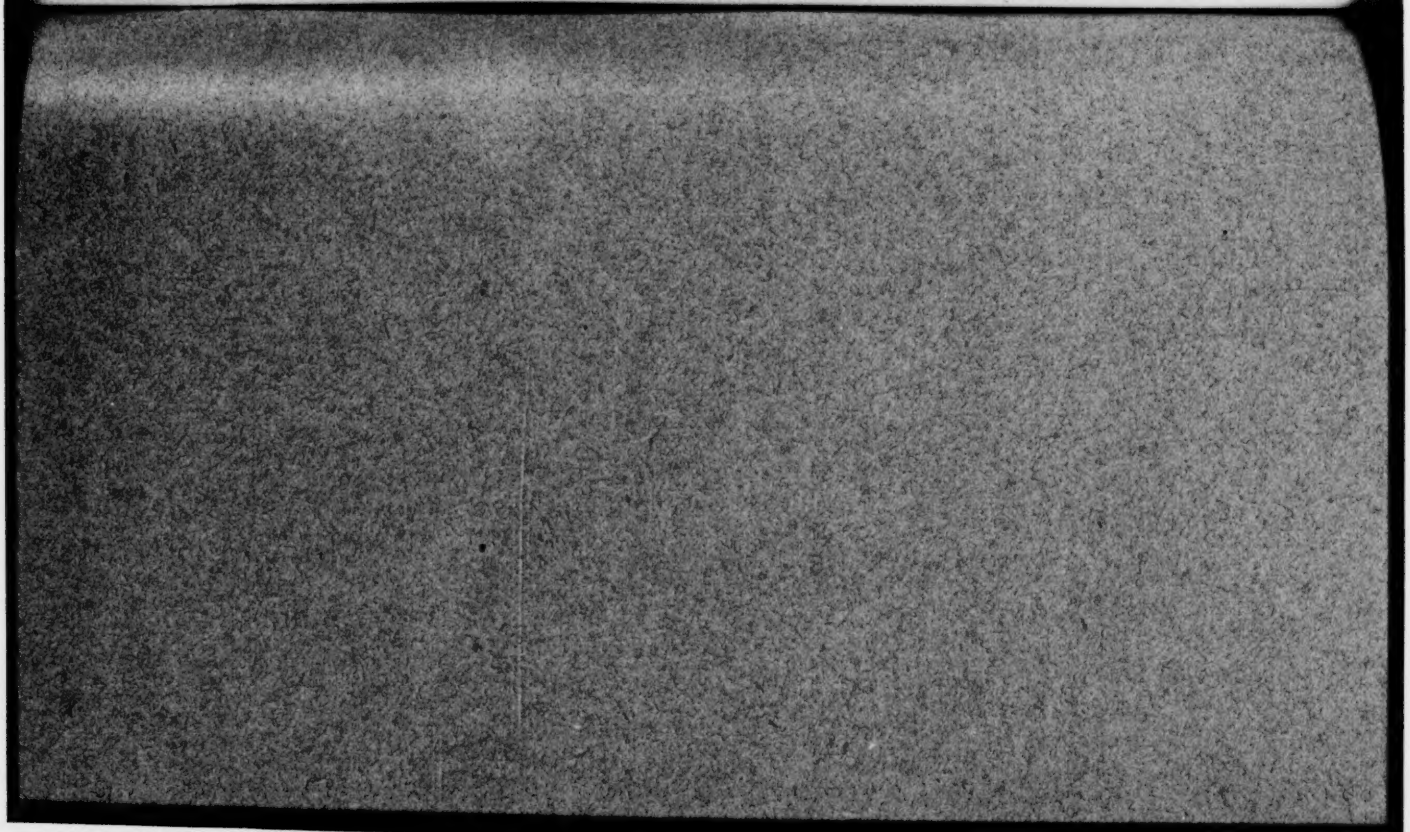
THE LAKE SHORE AND MICHIGAN SOUTHERN RAILWAY COMPANY, . . *Plaintiff in Error,*

AGAINST

THE STATE OF OHIO, Ex Rel. GEORGE L. LAWRENCE, ... *Defendant in Error.*

BRIEF OF PLAINTIFF IN ERROR.

GEORGE C. GREENE,
Of Counsel for Plaintiff in Error.



Supreme Court of the United States.

THE LAKE SHORE & MICHIGAN SOUTHERN RAILWAY COMPANY, PLAINTIFF IN ERROR, *vs.* THE STATE OF OHIO, EX REL. GEORGE L. LAWRENCE, DEFENDANT IN ERROR.

BRIEF OF PLAINTIFF IN ERROR.

ERROR TO SUPREME COURT OF OHIO.

STATEMENT.

This case comes to this court upon a Writ of Error to the Supreme Court of the State of Ohio from the judgment of that court affirming a judgment rendered in the Court of Common Pleas of Cuyahoga County, Ohio, in favor of the defendant in error against the plaintiff in error, for $100.00 penalty and costs.

The suit was originally brought in Court of Justice of the Peace, but was removed to the Common Pleas.

The Petition appears at page 11 of the Record, and the plaintiff therein claimed to recover a penalty for non-compliance with section 3320 of the Revised Statutes of Ohio, which reads as follows:

"SEC. 3320. (PASSENGER TRAINS MUST STOP AT CERTAIN STATIONS.) Each company shall cause three, each way, of its regular trains carrying passengers, if so many are run daily, Sundays excepted, to stop at a station, city or village, containing over three thousand inhabitants, for a time sufficient to receive and let off passengers; if a com

pany, or any agent or employee thereof, violate, or cause or permit to be violated, this provision, such company, agent, or employee shall be liable to a forfeiture of not more than one hundred nor less than twenty-five dollars, to be recovered in an action in the name of the state, upon the complaint of any person, before a justice of the peace of the county in which the violation occurs, for the benefit of the general fund of the county; and in all cases in which a forfeiture occurs under the provisions of this section, the company whose agent or employee caused or permitted such violation shall be liable for the amount of the forfeiture, and the conductor in charge of such train shall be held, *prima facie*, to have caused the violation."

The Answer, among other things, alleged:

"Second. And for a further and second defense to the several matters and things set forth in the plaintiff's petition, this defendant says, that it is a railroad company, owning and operating a railroad from Chicago, in the State of Illinois, through the States of Michigan, Indiana, Ohio, Pennsylvania and New York.

"That it is and was at the time of the commencement of this action and on the 9th day of October, 1890, engaged in carrying passengers and freight to and from the State of Illinois, through each of said several states, to and into and from the State of New York, and in the business of interstate commerce, both in the carriage of passengers and freight. That it did not at the time of the commencement of this action, or on the 9th day of October, A. D., 1890, run daily both ways, or either way, over said road, through the village of West Cleveland, three regular trains carrying passengers, that did not have upon them passengers who had paid fare and were entitled to ride on said trains, going in the one direction to the City of Buffalo through the State of Pennsylvania, and those trains going in the other direction, through the State of Indiana to the City of Chicago. That the stopping of such through trains in the village of West Cleveland, was and is a serious detriment and impediment to interstate commerce in the carriage of passengers between, into and through said several states, and that the stopping of such through passenger trains in said Village of West Cleveland, would cause and would have

caused great and serious detriment and damage to this defendant and to the several passengers who had thus or would thus pay their fares for through transit from the said City of Chicago to said City of Buffalo, and from said City of Buffalo to said City of Chicago, causing each of said passengers unnecessary delay and damage in passing over said route. And this defendant further says that the stopping of said through passenger trains or either of them continuously on each day, when passing through said village of West Cleveland, would have produced and would produce great and irreparable injury to this defendant and to the public generally.

Defendant further says that the supposed law and statute of the State of Ohio upon which this action is based is null and void, and repugnant and contrary to article one, section eight, of the Constitution of the United States, which confers upon Congress the power to regulate commerce among the several states; and to the states of the United States passed by virtue of such power."

The Reply admitted:

"That defendant is in the management and control of a railroad which extends from Buffalo, New York, to Chicago, Illinois, through the several states in said answer named, and that it is and was on the 9th day of October, 1890, engaged in carrying passengers and freight from the one end of said road to the other. And that the trains so running through the village of West Cleveland carried passengers who had paid their fare and were entitled to ride on said trains from the one end of said road to the other."

The Reply denied the other allegations of the answer.

Upon the trial a jury was waived, and the cause was submitted to the Court upon the pleadings and an agreed statement of facts;

Whereupon the Court found the facts in issue as follows:

"That the complainant is a resident of the village of West Cleveland in Brooklyn township, Ohio. That on the 9th day of October, 1890, and for some time prior thereto, said village contained more than 3,000 inhabitants, and that it is a municipal corporation. That defendant is

a corporation organized under the laws of the States of Ohio, New York, Pennsylvania, Indiana, Michigan, and Illinois, and owns and operates a railroad that is located in part within said village of West Cleveland. That defendant, on the 9th day of October, 1890, and for some time prior thereto, and for some time thereafter, caused to run, daily, both ways over that part of said railroad situated within said village, three or more regular trains carrying passengers. That on said 9th day of October, 1890, said day not being Sunday, the defendant did not stop, nor cause to be stopped, more than one of its regular trains for carrying passengers running each way within said village of West Cleveland, long enough to receive or let off passengers. That said railroad so operated by defendant and passing through said village, is owned and operated by defendant from Chicago in the State of Illinois, passing through the States of Illinois, Michigan, Indiana, Ohio, Pennsylvania, and New York to the City of Buffalo. That said defendant was, on and prior to said 9th day of October, 1890, and has been ever since, engaged in carrying passengers and freight over said railroad, passing through said village of West Cleveland to and from Chicago in the State of Illinois, and other stations in Indiana and Michigan, through each of said several states to and into the States of New York, Pennsylvania, and Ohio, and to the City of Buffalo, and from the City of Buffalo, in the State of New York, and other stations in Pennsylvania as aforesaid, through and into each of said several states and to the City of Chicago, and is and then was engaged in the business of interstate commerce, both in the carriage of passengers and freight from, into, and through said states. That said defendant did not on the 9th day of October, A. D. 1890, nor shortly prior thereto, or since, up to the time of the commencement of this suit, run daily, both ways or either way, over said road through the village of West Cleveland, three regular trains nor more than one regular train each, carrying passengers, which were not engaged in interstate commerce, or that did not have upon them passengers who had paid through fare and were entitled to ride on said trains going in the one direction from the City of Chicago to the City of Buffalo, through the States of Indiana, Ohio, and Pennsylvania and those going the other direction from the City of Buffalo through the States of Indiana, Ohio, and Penn-

sylvania and those going in the other direction from the City of Buffalo through said states to the City of Chicago. That on or about the said 9th day of October, A. D. 1890, the said defendant operated but one regular train, carrying passengers each way, that was not engaged in carrying such through passengers; and said train did stop at West Cleveland aforesaid, on the day aforesaid, for a time sufficient to receive and let off passengers. The through trains that passed through West Cleveland on the 9th day of October, A. D. 1890, were train No. 1, limited express, had two baggage and express cars, one coach and three sleepers, from New York to Chicago; passed Rockport at 1.40 A. M. Train No. 11, fast mail, had five U. S. mail cars, one coach, and one sleeper from New York to Chicago; passed Rockford at 1.55 P. M. Train No. 21 had one U. S. mail car, two baggage and express cars, four coaches, and one sleeper from Cleveland to Chicago; passed Rockford at 3.40 P. M. These trains all run west. Limited express train No. 4 had one baggage and express car and three sleepers from Chicago to New York; passed Rockport 2.35 A. M. Train No. 6 had one baggage and express car, three coaches, and two sleepers, from Chicago to New York; passed Rockport 1.20 A. M. Train No. 24 had one U. S. mail car, two baggage and express cars, and seven coaches, from Chicago to Buffalo; passed Rockford 10.02 A. M. Train No. 14 had three U. S. mail cars and one sleeper, from Chicago to New York; passed Rockport 5.35 P. M. These last-mentioned trains all run eastwardly. That the average time of delay necessarily required to stop a train of cars and sufficient time to receive and let off passengers would be three minutes, and that the number of cities and villages in the State of Ohio, containing three thousand inhabitants, through which the aforesaid trains of the defendant passed on said day were thirteen, to wit: Conneaut, Ashtabula, Geneva, Painesville, Cleveland, West Cleveland, Elyria, Oberlin, Norwalk, Fremont, Sandusky, Toledo, and Bryan. The aforesaid being the facts agreed upon by and between the parties hereto, and no other or further evidence being given."

And as conclusions of law the Court found as follows:

"That the requirements of said section 3320, Revised Statutes of Ohio, as amended April 13, 1889, Ohio Laws,

volume 86, page 291, are in no sense a regulation of commerce between the states. That the provision of this section is the regulation by the state of a corporate body of its own creation with reference to the domestic and local concerns of the state. That the fact that said corporation has engaged in carrying interstate passengers, and such passengers are to be found upon all of its trains which do not stop at said station, does not oust the legislative control of the state, and the said act of the legislature of Ohio is not in derogation of section 8, article 1, of the Federal Constitution, granting to Congress power to regulate commerce among the states. That if the subject-matter of section 3320 does come within the provisions of said article 8 of the Federal Constitution so that the requirements of said section may be said to regulate interstate commerce, then the subject-matter of the regulation is one that is purely local in its character, depending entirely upon local conditions and surroundings for the determination in each case as to what constitutes suitable and proper regulation, and therefore does not come under the exclusive commercial power of Congress, and as Congress has taken no action in respect to the subject-matter of this section this subject is open to control by the state, and the court finds that plaintiff is entitled to recover from the said defendant the sum of one hundred dollars. The court further finds as a conclusion of law that in the rendition of the judgment herein, it was and is necessary and material to the case to determine whether paragraph 3, section 8, article 1, of the Constitution of the United States as to the regulation of commerce among the several states would be in any manner interfered with or violated by the judgment of the court herein rendered, the defendant claiming that it would; but this court, as a conclusion of law, holds adversely to such claims. To each and all of which several findings of fact and conclusions of law, the defendant severally excepts and files its motion for a new trial of this cause, which motion is heard and overruled, to which ruling said defendant excepts. It is therefore considered that said plaintiff recover of said defendant said sum of one hundred dollars ($100.00), and also its costs of this suit to be taxed; judgment is rendered against the said defendant for its costs herein. To which judgment the said defendant excepts."

The judgment of the Court of Common Pleas was affirmed by the Circuit Court and the Supreme Court of the state.

The Supreme Court, in deciding the case, certified:

"That said plaintiff in error claimed in its brief and argument in this case that it was necessary and material to the case to determine whether paragraph three, section eight, of article one, of the Constitution of the United States, as to the regulation of commerce among the several states, is in any manner interfered with or violated by the statute of the State of Ohio mentioned in the petition herein or by the judgment of the court below or would be by an affirmance by this court of said judgment. The plaintiff in error claimed that said statute and judgment of the court below and an affirmance by this court are repugnant to and in violation of said provision of the Constitution. The court below in its said judgment, and this court by its affimance of said judgment, held said statute valid and adjudged against said plaintiff in error upon its defense to said action; and it is further certified that this court is the highest court in this state in which a decision of this case can be had."

Assignment of Errors.

The plaintiff in error assigned the following errors:

"1st. The rendering of said judgment and of the affirmances thereof was an interference with and a violation of paragraph 3, section, article 1, of the Constitution of the United States, as to the regulation of commerce between the several states, and the statute of the State of Ohio on which said judgment was based and which was upheld by said judgment and the affirmances thereof, to wit, sec. 3320 of the Revised Statutes of Ohio, as amended April 13th, 1889, Ohio Laws, vol. 86, page 291, was and is repugnant to and an interference with and in violation of said provision of the Constitution of the United States, and said statute and the enforcement thereof by and through the said judgment of the courts of the state are an exercise by the state of the power to regulate commerce between the states.

"2d. The statute above referred to was by the said courts of Ohio construed and held to apply to trains of plaintiff in error which were engaged in interstate commerce, and the penalty imposed by the statute was inflicted upon plaintiff in error for failure to comply with said statute and stop a train which was engaged in interstate commerce.

"The power and authority to regulate, control, or place any burden upon such commerce being solely vested in the Congress of the United States by the aforesaid provision of the Constitution, the said statute as so construed by said courts is repugnant to and a violation of said constitutional provision.

"3d. Said judgment of affirmance rendered by said Supreme Court was and is erroneous, contrary to and without authority of law, and in violation and contravention of the Constitution of the United States.

"4th. Other errors apparent upon the record."

The material facts, briefly stated, are:

The defendant, a corporation organized under the laws of six states, Ohio being one, was engaged in interstate commerce among said states, carrying both passengers and freight, upon trains which ran from Chicago to Buffalo.

October 9th, 1890, and before and since, it ran through West Cleveland only one train each way daily which was not engaged in interstate commerce, and that did not have interstate through passengers traveling thereon the whole length of the road.

The said one train each way did stop at West Cleveland on that day for sufficient time to receive and let off passengers. No other trains so stopped.

West Cleveland contained more than three thousand inhabitants, and there were thirteen cities and villages on the line of defendant's road in Ohio having like population.

The necessary delay caused by stoppage of a train is three minutes, making total delay in stopping at all said places in Ohio, thirty-nine minutes. (Record, p. 18.)

It is to be borne in mind that each and every passenger train which did not stop at West Cleveland was engaged in interstate commerce, and had on board passengers who had paid through fare between Buffalo and Chicago. (Record, 17–18.) It does not appear that any passenger on either of said trains desired to stop at West Cleveland, nor that any person desired to take either of said trains at that point. It does appear that one regular passenger train each way stopped there daily. It does not appear that anyone was prejudiced by the failure to stop more than the one train.

The statute above quoted, therefore, was a regulation which affected interstate commerce, and imposed a burden upon it, in requiring the stoppage within the state of interstate trains at local stations to receive and discharge passengers.

POINTS AND ARGUMENT.

The plaintiff in error contends that the power to regulate, control or place any burden upon interstate commerce being vested in the Congress of the United States, the statute in question, having been held by the Supreme Court of the state to apply to trains which were engaged in interstate commerce, is, as to such trains and commerce, null and void, and repugnant to the provisions of Article I, Section 8 of the Constitution of the United States.

1. *The enforcement of the statute against defendant so as to compel it to stop its trains engaged in interstate commerce would impose a severe burden upon the defendant and upon that commerce.*

If it be within the state's power to regulate and impose the burden to the extent imposed by this statute, it is

within its power to say to what extent it will regulate and impose burdens upon such commerce.

The question here is as to the right or power of the state; not as to the extent or reasonableness of the exercise of power.

If such right exists, the state may determine to what extent it shall be exercised, so that the constitutional provision would mean simply that Congress shall have power to regulate such commerce, subject to such regulations as the state may see fit to establish.

That contention cannot be maintained; but Congress has, solely and exclusively, the power to regulate such commerce; and no state regulation which imposes restrictions, delays or burdens thereon can be upheld.

II. *It is not conceded, but denied, that the state has authority, even under the "police power," to do that which would operate as a regulation of such commerce.*

As was said in Crutcher *vs.* Kentucky, 141 U. S., 47:

"But it does not follow that everything which legislature of state may deem essential for the good order of society can be set up against the exclusive power of Congress to regulate the operations of foreign and domestic commerce * * * It is within the province of state legislature to make regulations with regard to the speed of railroad trains in the neighborhood of cities and towns * * * and generally with regard to all operations in which the *lives and health* of people may be endangered, even though such regulations affect to some extent the operation of interstate commerce."

In Henderson *vs.* Wickham, 2 Otto, 259, it was held:

"It is no answer to the charge that a regulation of commerce by a state is forbidden by the Constitution to say that it falls within the police powers of the states; for to whatever class of legislative power it may belong, it is prohibited by the states if granted exclusively to Congress by that instrument."

In Hannibal & St. J. R. Co. *vs.* Husen, 95 U. S., 465-474, it is said:

"But whatever may be the nature and reach of the police power of a state, it cannot be exercised over a subject confided exclusively to Congress by the Federal Constitution. It cannot invade the domain of the National Government. * * * Transportation is essential to commerce, or rather it is commerce itself; and every obstacle to it, *or burden laid upon it* by legislative authority, *is regulation*." (P. 530.)

In re Sanders, 52 Fed., 802-808, the Court says:

"I conclude that the police power of the state can not be held to embrace a subject confided exclusively to Congress by the Constitution of the United States. If the subject matter of state legislation is included in exclusive grant of commercial power to Congress, then the state enactment is void, even if it passed in the exercise of the police power of the state."

In Bowman *vs.* Chicago, etc., Railway Company, 125 U. S., 465, Mr. Justice Matthews said:

"Here is the limit between the sovereign power of the state and the federal power: That is to say, that which does not belong to commerce is within the jurisdiction of the police power of the state; and that which does belong to commerce is within the jurisdiction of the United States."

In Brannan *vs.* Titusville, 153 U. S., 299, the Court reaffirms the language of Mr. Justice Harlan, in New Orleans Gas Co. *vs.* Louisiana Light Co., 115 U. S., 65, 661, that:

"Definitions of the police power must, however, be taken subject to the condition that the state can not, in its exercise, for any purpose whatever, encroach upon the powers of the general government or the rights secured by the supreme law of the land."

And the Court further says (page 302):

"We think it must be considered, in view of a long line of decisions, that it is settled that *nothing which is*

a direct burden upon interstate commerce can be imposed by the state without the assent of Congress, and that the silence of Congress in respect to any matter of interstate commerce is equivalent to a declaration on its part that it should be absolutely free."

In Railroad Co. *vs.* Husen, 95 U. S. Rep., 465, a statute of Missouri, which prohibited the driving or conveying of any Texas, Mexican or Indian cattle into the state between the first day of March and the first day of November in each year, was held to be "in conflict with the clause of the Constitution that ordains 'Congress shall have power to regulate commerce with foreign nations and among the several states and with the Indian tribes.'"

In the opinion it is said by Mr. Justice Strong:

"*This court has heretofore said that interstate transportation of passengers*, is beyond the reach of a state legislature. And if, as we have held, state taxation of persons passing from one state to another, or a state tax upon interstate transportation of passengers, is prohibited by the Constitution because a burden upon it, *a fortiori*, if possible, is a state tax upon the carriage of merchandise from state to state. Transportation is essential to commerce, or rather it is commerce itself; *and every obstacle to it, or burden laid upon it by legislative authority, is regulation.*" * * *

"We are thus brought to the question whether the Missouri statute is a lawful exercise of the police power of the state. We admit that the deposit in Congress of the power to regulate foreign commerce and commerce among the states was not a surrender of that which may properly be denominated police power. What that power is, it is difficult to define with sharp precision. It is generally said to extend to making regulations promotive of domestic order, morals, health and safety. As was said in Thorp *vs.* The Rutland & Burlington Railroad Co., 27 Vt. 149, 'it extends to the protection of the lives, limbs, health, comfort, and quiet of all persons, and the protection of all property within the state.'" * * *

"Many acts of a state may, indeed, affect commerce, without amounting to a regulation of it, in the constitu-

tional sense of the term. And it is sometimes difficult to define the distinction between that which merely affects or influences and that which regulates or furnishes a rule for conduct. There is no such difficulty in the present case. While we unhesitatingly admit that a state may pass sanitary laws, and laws for the protection of life, liberty, health, or property within its borders; while it may prevent persons and animals suffering under contagious or infectious diseases, or convicts, etc., from entering the state; while for the purpose of self-protection it may establish quarantine, and reasonable inspection laws, it may not interfere with transportation into or through the state, beyond what is absolutely necessary for its self-protection. It may not, under the cover of exerting its police powers, substantially prohibit or burden either foreign or interstate commerce." * * *

"In coming to such a conclusion, we have not overlooked the decisions of very respectable courts in Illinois, where statutes similar to the one we have before us have been sustained. (Yeazel *vs.* Alexander, 58 Ill. 254.) Regarding the statutes as mere police regulations, intended to protect domestic cattle against infectious disease, those courts have refused to inquire whether the prohibition did not extend beyond the danger to be apprehended, and whether, therefore, the statutes were not something more than the exertions of police power. That inquiry, they have said, was for the legislature and not for courts. With this we cannot concur. The police power of a state cannot obstruct foreign commerce or interstate commerce beyond the necessity for its exercise; and under color of it objects not within its scope cannot be secured at the expense of the protection afforded by the Federal Constitution."

In the case of Gloucester Ferry Co. *vs.* Pennsylvania, 114 U. S. Rep. 196–203, it is said by the Court:

"Commerce among the states consists of intercourse and traffic between their citizens, and includes the transportation of persons and property, and the navigation of public waters for that purpose, as well as the purchase, sale and exchange of commodities. The power to regulate that commerce, as well as commerce with foreign nations, vested in Congress, is the power to prescribe the

rules by which it shall be governed, that is, the conditions upon which it shall be conducted; to determine when it shall be free and when subject to duties or other exactions. The power also embraces within its control all the instrumentalities by which that commerce may be carried on, and the means by which it may be aided and encouraged. The subjects, therefore, upon which the power may be exerted are of infinite variety. While with reference to some of them, which are local and limited in their nature or sphere of operation, the states may prescribe regulations until Congress intervenes and assumes control of them; yet, when they are national in their character, and require uniformity of regulation affecting alike all the states, the power of Congress is exclusive. Necessarily that power alone can prescribe regulations which are to govern the whole country. And it needs no argument to show that the commerce with foreign nations and between the states, which consists in the transportation of persons and property between them, is a subject of national character, and requires uniformity of regulation. Congress alone, therefore, can deal with such transportation; its non-action is a declaration that it shall remain free from burdens imposed by state legislation. Otherwise, there would be no protection against conflicting regulations of different states, each legislating in favor of its own citizens and products, and against those of other states. It was from apprehension of such conflicting and discriminating state legislation, and to secure uniformity of regulation, that the power to regulate commerce with foreign nations and among the states was vested in Congress."

"It cannot be too strongly insisted upon," said the Court in Wabash, etc., R. R. Co. *vs.* Illinois, 118 U. S., 557, "that the right of continuous transportation from one end of the country to the other is essential in modern times to that freedom of commerce from the restraints which the states might choose to impose upon it, that the commerce clause of the Constitution was intended to secure. And it would be a very feeble and almost useless provision, but poorly adapted to secure the entire freedom of commerce among the states, which was deemed essential to a more perfect union by the framers of the Constitution, if, at every stage of transportation of goods and chattels through

the country, the state within whose limits a part of the transportation must be done, could impose regulations concerning the price, compensation or taxation or any other restrictive regulation interfering with and seriously embarassing this commerce."

And in the case of Leisy *ex.* Hardin, 135 U. S., 100, known as the 'Original Package Case,' where the subject is fully considered, Mr. Chief Justice Fuller, in delivering the opinion of the court, used the following language:

"The power to regulate commerce among the states is a unit, but, if particular subjects within its operation do not require the application of a general or uniform system, the states may legislate in regard to them with a view to local needs and circumstances, until Congress otherwise directs; but the power thus exercised by the states is not identical in its extent with the power to regulate commerce among the states. The power to pass laws in respect to internal commerce, inspection laws, quarantine laws, health laws, and laws in relation to bridges, ferries, and highways, belongs to the class of powers pertaining to locality, essential to local inter-communication, to the progress and development of local prosperity, and to the protection, the safety and welfare of society, originally necessarily belonging to and, upon the adoption of the Constitution, reserved by the states, except so far as falling within the scope of a power confided to the general government." * * * *

"Inasmuch as interstate commerce consisting in the transportation, purchase, sale, and exchange of commodities, is national in its character, and must be governed by a uniform system, so long as Congress does not pass any law to regulate it, or allow the states so to do, it thereby indicates its will that such commerce shall be free and untrammeled."

And in the same case it was said:

"And while, by virtue of its jurisdiction over persons and property within its limits, a state may provide for the security of the lives, limbs, health and comfort of persons, and the protection of property so situated, yet a subject

matter which has been confided exclusively to Congress by the Constitution *is not within the police power of the state*, unless placed there by congressional action."

Mr. Justice Miller, in Henderson *vs.* Mayor of New York, 92 U. S., 259, declared that however difficult it may often be to distinguish between one class of legislation and another, it is clear, from our complex form of government, that whenever the statute of a state invades the domain of legislation which belongs exclusively to Congress, it is void, no matter under what class of power it may fall, or how closely allied to powers conceded to belong to the states.

In Hannibal, etc., R. R. Co. *vs.* Husen, *supra*, it was said:

"We admit that the deposit in Congress of the power to regulate foreign commerce among the states, was not a surrender of that which may properly be denominated police power. What that power is, it is difficult to define with sharp precision. It is generally said to extend to making regulations promotive of domestic order, morals, health, and safety. * * * But whatever may be the nature and reach of that power, it was added, 'it cannot be exercised over a subject confided exclusively to Congress by the Federal Constitution. It cannot invade the domain of the National Government.'"

III. *But the regulation imposed by the statute is not within the scope of the "police power" of the state.*

That power "may be lawfully resorted to for the purpose of preserving the *public health, safety or morals, or the abatement of public nuisances.*" (Holden *vs.* Hardy, U. S. Supreme Court, decided Feb. 28, 1898.)

This, I submit, is a correct definition of the police power, and although in some cases the courts have, perhaps inadvertently, referred to the "convenience" of the public as within such power, I respectfully submit that

the proper definition cannot be so extended. (Black Const. Prohib., § 64, p. 82; 4 Harvard L. Rev., 222; Prentice Police Power, 269–276.)

If the "convenience" of individuals is within that power, and the state is at liberty to make such regulations as it deems necessary or proper for their convenience, then its power to regulate commerce is co-ordinate with that of the Congress.

In the State *vs.* Noyes, 47 Me. 189–211, the Court said:

"It is not denied, in behalf of the defendant, that the power contended for by the prosecuting officer of the state does actually exist in the legislature, so far as it has reference to the safety of persons and property. But it is denied that the power exists, so that it can be exercised so far as to establish laws promotive of the *convenience* simply, of individuals, among themselves; and it is also denied that private corporations can be in any degree affected by laws passed by the legislature, for the sole purpose of promoting the *convenience* of other private corporations, or the public generally, or any citizens, or classes of citizens, in contravention of provisions in the charter of such private corporations respectively, unless it is by the constitutional provision of taking private property for public purposes, and upon compensation therefor.

"With the legislature, the maxim of the law *salus populi suprema lex*, should not be disregarded. It is the great principle on which the statutes for the security of the people is based. It is the foundation of criminal law, in all governments of civilized countries, and other laws conducive to safety and consequent happiness of the people. This power has always been exercised by government, and its existence cannot be reasonably denied. How far the provisions of the legislature can extend, is always submitted to its discretion, provided its acts do not go beyond the great principle of securing the public safety—and its duty, to provide for this public safety, within well-defined limits and with discretion, is imperative. The principle is expressly recognized in the Constitution of this state (Article 1, Sections 1 and 20). All laws for the protection of the lives, limbs, health and quiet of persons, and the security of all property within

the state, fall within this general power of the government. The statute requirement that the bell upon the engine of a railroad shall be rung as the train approaches a crossing of other roads; the placing of sign-boards to warn persons who may be at or near a crossing; the erection of gates and bars, and the employment of persons to guard the crossings at the time of the passage of locomotives and cars; and of faithful and skillful brakemen upon the trains, and the coming to a stop at a specified distance of the place of the crossing of another railroad before crossing the same, and many others, are examples of the exercise of this power of the government, through the legislature. (Thorpe *vs.* R. & B. R. R. Co., 27 Vermont, 142)." * * * ."If the power existed to impose it in the slightest degree, we know of no line of limitation. It would certainly be convenient for the travelers living in a country thickly settled with inhabitants, to be able to find stations where they can take passage within the shortest distances of each other; and have the train come to a stand against the dwelling of everyone living near the railroad track, that he might be accommodated in taking his passage with greater convenience to himself, than it would be if he were obliged to take another mode to reach a station." * * *

"But from logical deductions from adjudged cases, which have been referred to, the doctrine that police regulations may be established by the legislature for the convenience of the public, or travelers on railroads, can not be upheld."

The case at bar is clearly distinguishable from Hennington *vs.* Georgia, 163 U. S., 299 (Sunday Law case), but the doctrine of that case supports my contention. There it was held (p. 303–4) that:

"The well-settled rule is that if a statute purporting to have been enacted to protect the public health, the public morals or the public safety, has no real relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of courts to so adjudge, and thereby give effect to the Constitution." (Citing Minnesota *vs.* Barber, 136 U. S. 313, and Mugler *vs.* Kansas, 123 U. S. 623–661.)

Here the statute has no relation to "the public health, the public morals or the public safety."

Again in that case the Court said (p. 317):

"These authorities make it clear that the legislative enactments of the states *passed under their admitted police powers, and having a real relation to the domestic peace, order, health and safety of the people*, but which, by their necessary operation, affect to some extent, or for a limited time, the conduct of commerce among the states, are yet not invalid by force alone of the grant of power to Congress to regulate such commerce."

Here the statute has no relation whatever "to the domestic peace, order, health or safety of the people."

In that case the law was upheld because it belonged to a class of local laws described by the Court as follows:

"Local laws of the character mentioned have their source in the powers which the states reserved, and never surrendered to Congress, *of providing for the public health, the public morals and the public safety.*"

There it was held that the law prohibiting transaction of secular business on Sunday, and declaring that on and during that day, fixed by law as a day of rest for all the people within the state from toil and labor, was a valid exercise of the police power of the state as an ordinary police regulation (p. 318). It may well be maintained that such a law was designed to promote the public health and morals, but can it be maintained that the stoppage of interstate trains at local way stations to take on and let off passengers would promote public health, morals or safety? Clearly not.

In Illinois Central R. R. *vs.* Illinois, 163 U. S., 142, this Court said (p. 153):

"The state may make reasonable regulations to secure the *safety* of passengers, even on interstate trains, while within its borders. *But the state can do nothing which will directly burden or impede the interstate traffic of the company*, or impair the usefulness of its facilities for such traffic."

IV. *The fact that the defendant is a corporation created by the states does not subject it to such state regulations.*

It is true that the states gave to the defendant corporate existence, but the charters were granted by the states and accepted by the defendant and its constituent companies under and subject to the provisions of the United States Constitution in respect to regulations of interstate commerce. The state had the power to so create the corporations with power to engage in interstate commerce, and the corporations, having accepted their charters and constructed their roads thereunder, they have the right to engage in and carry on such commerce, subject only to such regulations by the state in relation thereto as the state might impose upon an individual carrier engaged in such commerce. So long as the company has the right to carry on interstate commerce, so long it is subject only to regulation thereof by Congress and not by the states.

The Congress, by act of June 15, 1866 (14 U. S. Stat., 66), provided that "Every railroad company in the United States * * * is hereby authorized to carry upon and over its road * * * all passengers * * * on their way from any state to another state, and to receive compensation therefor, and to connect with roads of other states, so as to form continuous lines for transportation of the same to the place of destination."

By this act and the Interstate Commerce Act, Congress has regulated interstate traffic so far as it deemed it proper or necessary to regulate.

The states may take away charters and withhold the right or power to do anything, but they cannot regulate the interstate commerce in which a corporation is engaged so long as it has lawful authority to be so engaged.

When the state authorizes a body of its creation to engage in interstate commerce, and so long as that authority exists, the paramount and exclusive right to regulate its

conduct in respect thereto resides in Congress, and the state must not interfere with, control or impose any regulations which would place a burden upon it. (See Fargo *vs.* Michigan, 121 U. S., 230.)

In Illinois Central Railroad Co. *vs.* Illinois, 163 U. S., 142, the Court said: "The state may doubtless compel the railroad company to perform the duty imposed upon it of carrying passengers and goods between its termini within the state. But so long as that duty is adequately performed by the company the state cannot, under the guise of compelling its performance, interfere with the performance of paramount duties to which the company has been subjected by the Constitution and laws of the United States." Here there is no pretense or evidence in this case that the company has not adequately performed its duty in respect to carrying passengers within the state, and upon the facts as they are admitted the attempt here is to apply this statute to interstate trains only, and thus interfere with the performance of paramount duties imposed upon the company, and with rights, powers and privileges granted to it by the Constitution and laws of the United States.

V. I insist that the defendant company has the right to start its train at Chicago with passengers for Buffalo, and pass through all the states without taking on or discharging passengers at any intermediate point, and that the state has no right to require that such train shall receive or discharge passengers within its limits. Unless this be true, then it is in the power of the state to require that every train engaged in interstate commerce shall stop at every station in the state to receive and discharge passengers or freight.

If the power to regulate exists in the state legislature, the extent to which it should be exercised would rest in legislative discretion, and the line where state regulation

should end and regulation by Congress begin, would be uncertain and dependent upon the will of the state legislature, and so the constitutional provision would be nugatory.

As was said by Chief Justice Waite, in Hall *vs.* DeCuir, 95 U. S., p. 488:

"We think it may safely be said that state legislation which seeks to impose a direct *burden* on interstate commerce or to *interfere directly with its freedom*, does encroach upon the exclusive power of Congress." Again, "If each state was at liberty to regulate the conduct of carriers, while within its jurisdiction, the confusion likely to follow could not but be productive of great inconvenience and unnecessary hardship; each state could provide for its own passengers and regulate the transportation of its own freight, regardless of the interest of others. * * If the public good requires such legislation, it must come from Congress, not from the states" (p. 491).

In the Passenger Cases, 7 How. 399, the position of Mr. Justice Story is approved, that the power "to regulate commerce with foreign nations and among the states is exclusively vested in Congress."

In the State Freight Tax Case, 15 Wall, 281, it is said: "Transportation is essential to commerce, and *every burden* laid upon it is *pro tanto* a restriction."

Mr. Justice Brewer, in delivering the opinion of the Supreme Court, *In re* Debs, 158 U. S., 564–581, says:

"The uniform course of decision has been to declare that it is not within the competency of a state to legislate in such a manner as to obstruct interstate commerce."

In Burdick *vs.* People of Illinois, 149 Ill. 600, the Court says:

"In relation to the subject of commerce, including interstate passenger travel, the state cannot place any obstacle in the way of such travel, or impose any burden upon it."

It certainly cannot be contended that to require trains engaged in interstate traffic to stop at some or all way

stations, and receive and discharge way passengers and freight, would not impose a serious burden upon and greatly interfere with and hamper the through or interstate traffic.

If the state may exercise the power so far as is provided in the act under consideration, it may require that every train shall stop at every station and receive and discharge freight and passengers; and if Ohio may do it, every other state may do the same, and the public be deprived of the facilities now afforded for through traffic; so that instead of being able to make the trip from Chicago to New York in twenty-two hours, double that time must be consumed by stops at way stations, and the entire business of the country subjected to great burdens and annoyance.

If the state may thus interfere with interstate passenger traffic, it may do the same in relation to freight traffic, and the through interstate business be subjected to obstruction, delays and the annoyances incident to the local freight trains.

It is no answer to say that the states will not *unreasonably* exercise this power, and hence no injury is to be apprehended.

As before said, the question here is one of power, not of expediency, or of due or undue exercise of power.

VI. In the case of Gladson *vs.* Minnesota, 166 U. S. 427, the facts were essentially different from the facts in the case at bar, and the contention of the plaintiff in error here may be sustained without conflict with the decision in that case.

In that case the "train in question ran wholly within the State of Minnesota" and the Act of the legislature expressly provided, "this Act shall not apply to through railroad trains entering this state from any other state, or to transcontinental trains of any railroad" (p. 432).

In the case at bar the trains were interstate trains engaged in transporting passengers from and between Chicago and Buffalo through Ohio and other states, and the Supreme Court of the State of Ohio holds and decides that the statute in question in this case does apply to such interstate trains.

In Illinois Central case it was said:

"The question whether a statute which merely required interstate railroad trains, without going out of their course, to stop at county seats, would be within the constitutional power of the state, is not presented and can not be decided upon this record."

It is respectfully submitted that upon the record in this case is presented the question whether a statute, which controls and regulates the movement of interstate trains, compels them to stop at way stations and do a local business, prevents rapid transit of passengers booked for transportation through several states, and which compels them to await the pleasure and convenience of the people along their route of travel, is, or is not, a statute which imposes a burden upon and operates as a regulation of interstate commerce, or within the constitutional power of the state.

I insist that under the Constitution and laws an interstate common carrier, by railroad, stage coach, or otherwise, has the right to start his coach or train at any point in one state and pass to and through another state without taking up or setting down any passengers in the state through which he passes, and that it is not within the power of any state to prevent such transportation or to impose any burdens upon it which do not strictly relate to the health, morals or safety of the public.

For the reasons above stated the plaintiff in error asks that the judgment of the Supreme Court of Ohio be reversed.

GEO. C. GREENE,

Of Counsel for Plaintiff in Error.

Buffalo, April, 1898.